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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-334

SEYMOUR MATANKY,
Petitioner,

vs.

UNITED STATES OF AMERICA

On Petition For A Writ of Certiorari to
The United States Court of Appeals For
The Ninth Circuit

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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The government's opposition ignores the important federal questions and particularly the question as to whether Congress has authorized prosecution under Title 18, Section 1001 in this and related types of cases throughout the country.

Congress has specifically designated who can be prosecuted under Title 18, Section 1001, to-wit, Title 18, Section 6 — agencies and departments of the gov-

ernment. Private insurance companies with private contracts to perform services are not agencies and departments of the government.

This Court should grant certiorari (Rule 23; 32 L. Ed. 2d 830) to determine whether the Department of Justice or its related employees as United States Attorneys have the power to make law and to vary Congress's enactment of Title 18, Section 1001. If the prosecutors can select this section at their own election, and if the Courts sustain such variance, then it is the Department of Justice and the Attorney General and United States Attorneys who make the laws. This is an important question which has not been passed upon by this Honorable Court, nor was it even considered at the trial or appellate level. It presents special and important reasons involving an important question of federal law which has not been but should be settled by this Court. The prosecutions under Title 18, Section 1001, have departed from the express language of Congress. There are therefore special and important reasons why this Court should grant certiorari on this question of substance. (*Fay v. Noia,* 372 U.S. 391, 9 L.ed.2d 837; *U.S. v. Muniz,* 374 U.S. 150, 10 L.ed.2d 805)

The Congress, in which legislative authority of the United States is vested by the Federal Constitution, was given certain enumerated powers (U.S. Constitution, Article I, Section 8; 54 Am.Jur. p. 537, Sec. 23) It may make necessary and proper laws, (54 Am.Jur.,

p. 541) and it may enact laws to provide for the punishment of all crimes against the United States. (54 Am. Jur., p. 542)

It is a cardinal principle of our form of constitutional representative government that the legislative body cannot delegate the power to make laws to any other authority or body. (54 Am.Jur., p. 544) This would bar the United States Attorney or his Assistant from stretching the authority of his office or the grand jury to give authority to make a paying agent of a private insurance company into a department and agency of the United States.

This case raises the important federal question as to whether persons who have contracts with Lockheed or with Amtrak or anyone having a contract with the government are subject to a prosecution under Title 18, Section 1001. The leading case heretofore passed upon by this Court was *U.S. v. Gilliland,* 312 U.S. 86, 85 L.ed. 598. This Court construed the *Gilliland* case as relating to "a matter within the jurisdiction of the Department of the Interior, the Secretary of the Interior and the Federal Tender Board No. 1, Kilgore, Texas."

The Act of Congress authorized the President to prescribe regulations for the enforcement of the Act. Comparison of the terms of the Act in the *Gilliland* case with the issues involved in this case show that Congress did not give any such authority to proceed under Title 18, Section 1001. Clearly, this case is dis-

tinguishable from the procedure in *U.S. v. Gilliland.* This is the first case presented to this Court of major importance and scope, asking this Court to define and delineate the right to prosecute under Section 1001 and to permit the prosecutor to elect to prosecute under this section. The evidence shows that all three insurance companies are State chartered insurance companies and not federally chartered and 30 of the 39 counts involved were State funds and not federal funds and therefore beyond the jurisdiction of the federal Court.

The memorandum in opposition does not answer the failure of the trial judge to instruct the jury on the definition that Congress has given to the word "willful", that is, that the acts charged were done with an evil motive and bad purpose. (*U.S. v. Bishop,* 36 L.ed. 2d 941) This becomes very important in the case of doctors who delegate the matter of preparing bills for services and other clerical tasks to employees.

Form 1490, which was the billing operation for the Doctor's services, was generally filled out by a medical assistant and not by the Doctor. There is no evidence that anyone else filled out these forms, including the Doctor. The billings were done by Maria Carmen Harrington, a medical secretary. (R.T. 1168, et seq.) Nowhere did Mrs. Harrington ever testify that the Doctor gave her any instructions to falsify or to make up any erroneous billings or that the bills were made out in bad faith or with evil intent.

Congress has set out in Section 1395u of Title 42 the use of carriers for the administration of benefits, but nowhere has it specified that prosecution of doctors should be under Title 18, Section 1001, nor has it designated them as agencies of the government or departments of the government.

Congress is quite explicit in Section 409(b) of Title 42. It is evident that Congress intended that if there were to be prosecutions within the scope of Medicare or Medi-Cal (Medicaid) that it be limited to the provisions of Title 42 USC Section 408(b). This is inferentially admitted by the memorandum in opposition, which points out that Title 42, U.S.C., 408(b), does not require that the false representation be made knowingly and willfully because Congress was aware that all these billings by doctors are delegated to employees and Congress did not intend doctors to be prosecuted for acts performed by their delegated employees under Section 1001 of Title 18.

Furthermore, the opposition is not following its contention in stating that the basis of the prosecution was the contract pursuant to Title 42 USC Section 1395u and then ignoring that section and attempting to support the trial under Title 18, Section 1001 and denying the applicability of Title 42, Section 408(b).

The opposition also denies the applicability of *Keeble v. U.S.*, 36 L.ed.2d 844, although in the *Matanky* case the defense had offered an instruction under Rule 31(c) and the defendant's right to such instruction

has been recognized in numerous decisions. (*Sansone v. U.S.*, 380 U.S. 343, 349; *Berra v. U.S.*, 351 U.S. 131, 134; *Stevenson v. U.S.*, 162 U.S. 313)

In attempting to eliminate the effect of the *Keeble* case, 412 U.S. 205, the opposition states that reliance on that case is "misplaced". However, the Court said in the *Keeble* case:

> "Moreover, it is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction — in this context or any other — precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction. . . . Indeed, while we have never explicitly held that the Due Process Clause of the Fifth Amendment guarantees the right of a defendant to have the jury instructed on a lesser included offense, it is nevertheless clear that a construction of the Major Crimes Act to preclude such an instruction would raise difficult constitutional questions."

The opposition has swept under the rug a large number of important questions raised in our petition by asserting that the Court of Appeals disposed of petitioner's contentions. It is because we contend that the Court of Appeals' rulings were incorrect that we petitioned for certiorari and for the supervisory power of this Court in the administration of criminal justice. Denial by the Court of Appeals on its construction of various issues raised in the trial and on appeal is no ground for denying certiorari and exercising this Court's supervision of criminal justice. The obvious tactics of the prosecutor in the numerous counts involving a single patient and a similar alleged course of conduct was to prejudice the defendant in the eyes of the jury, especially in view of the fact that the total amount of money involved in the indictment was $2,156.60. (See also *Bramlett v. U.S.*, 231 F.2d 489, 491; *Braverman v. U.S.*, 317 U.S. 49, 87 L.ed. 23)

This Court should grant certiorari in its supervisory power and in the interests of economical administration of justice. Each count in the indictment called for a $10,000 fine or five years on each count, or a total of $390,000 and 195 years. The time to try a small number of counts or even a single count would save the Court and litigants a great amount of expense and accomplish all that 39 counts would accomplish and prevent the prejudice resulting from numerous counts in the indictment.

The statement that the case was based upon the

testimony of petitioner's patients and nursing personnel was incorrect. Only three of petitoner's patients were called as witnesses. One was insane, another was established as an alcoholic, and the third had a faulty and mistaken memory. None of the nursing personnel claimed to have knowledge of the doctor's hours or itinerary and none were percipient witnesses as to the true facts. On the other hand, several indictment patients of the doctor made affidavits to the effect that the doctor had been in complete attendance for the period of time in question named in the indictment. Their statements were not refuted by the government at any time, but the trial Judge refused to act upon them during the course of the motion for new trial.

The government in opposition ignores entirely the fact that a prosecution under Title 18, Section 1001, has to be a violation against a department or agency of the government, as defined by Congress in Title 18, Section 6. Nowhere does the opposition contend that the prosecution was for a violation against a governmental agency as set out in Title 18, Section 6. The sole basis for the opposition to our contention in this regard is that the government sought to prosecute the petitioner for violation of allegedly making a false representation "knowingly and willfully". This is not the main concren or purpose of Title 18, Section 1001, and was not made such by Congress, again only to provide for prosecution for violation in connection with a department or agency of the gov-

ernment, and not three private insurance companies chartered only by the State of California.

We submit again that the law as written by Congress must be observed by the Courts and not legislated by private influence of insurance companies on local government prosecutors.

All of these matters require certiorari to be granted and for this Court to act in its supervisory capacity in the administration of criminal justice and to reverse the judgments below.

Respectfully submitted,

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